IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No. 23 of 2014

AFR

Milu @ Rashmi Ranjan Jena .... ***Appellant***

-versus-

State of Odisha .... ***Respondent***

Advocates appeared in the cases:

For Appellant : Mr. Bikram Chandra Ghadei
Advocate

For Respondent : Mrs. Saswata Patnaik
Additional Government Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE CHITTARANJAN DASH

JUDGMENT
31.10.2022

Dr. S. Muralidhar, CJ.

1. This appeal is directed against the order dated 17th December 2013, passed by the learned 1st Additional Sessions Judge, Puri in S.T. Case No.37/365 of 2013/2012, convicting the Appellant for the offence punishable under Section 376 of Indian Penal Code (IPC) and sentencing him to undergo rigorous imprisonment (RI) for seven years with a fine of Rs.5000/- and in default to undergo RI for a period of six months and further convicting the Appellant for the offence punishable under Section 302 of IPC and sentencing him to undergo RI for life with a fine of Rs.5000/- and in default to undergo RI for six months. Both the sentences were directed to run concurrently.

2. By the impugned judgment, the trial Court found the Appellant guilty of raping and murdering by setting on fire an adolescent minor girl of 15 years.

3. The case of the prosecution as spoken to by Ranjana Swain (PW-1), the mother of the deceased, was that the deceased was in friendly terms with the Appellant which was disapproved by the family members of the deceased. They asked the deceased to discontinue her relationship with the Appellant despite which, the deceased was stated to be still seeing him.

4. Further the case of the prosecution as spoken to by PW-1 was that in the night of 10th May, 2012 at around 2 am, when the deceased was sleeping with her grandmother in a room which was adjacent to the room in which PW-1 was sleeping with her husband, Nimai Swain (PW-4), the Appellant entered the house and called the deceased away. He is stated to have sexually assaulted her inside the mill. On her insisting that if the Appellant refused to marry her she would disclose the fact before the family members, the Appellant is stated to have poured kerosene kept in a jerry can in the mill and set the deceased on fire.

5. Hearing the shouts of the deceased, Pabitra Kumar Swain (PW-5) and Rinku Swain (PW-6) rushed to the mill as they were out to attend nature's call at that time. According to them, the rice mill (huller) was about 35 cubits from where they were. By the time they reached there, they noticed the Appellant who gave PW-5 a push blow and escaped from the spot. PWs-5 and 6 immediately

tried to save the life of the deceased by pouring water on her body. Thereafter, they shouted for help. Hearing their hullah, other family members living nearby came to the spot. They took the deceased first to the house when she was still in a conscious state and she disclosed before PWs 5, 6 and PW-1 that she had been called by the Appellant at the dead hour of the night to the rice huller, where he committed rape on her and when she insisted that he should marry her, the Appellant sprinkled kerosene on her body and set her on fire.

6. PWs 5 and 6 arranged to take the deceased first to the hospital at Rebena Nuagaon and thereafter to the District Headquarters Hospital (DHH), Puri where she was attended to by Dr. Chintamani Tripathy (PW-8) in the burns ward. PW-8 is stated to have recorded the dying declaration of the deceased at around 9 pm on 11th May, 2012. The deceased finally succumbed to the burn injuries and died on 13th May, 2012 around noon. Thereafter, her post-mortem was conducted by Dr. Susanta Kumar Panda (PW-9) who opined that the cause of death was due to septicaemia from anti-mortem burns which was more than 95%. It was at this stage that the vaginal swab was collected and sent for pathological examination.

7. Srikanta Kumar Tripathy (PW-10) was the Sub-Inspector of Police (SI) attached to the Puri Sadar Police Station (PS), before whom a written report was presented on 11th May, 2012. After registering the FIR under Sections 376/326/307 of IPC, he took up investigation and in course thereof, on 15th May, 2012 effected the

arrest of the Appellant from village Sahanikera. After the receipt of the information of death of the deceased on 13th May 2012, the offence was converted to Section 302 IPC apart from Section 376 IPC. Certain exhibits were collected from the spot and sent to the S.F.S.L., Rasulgarh for chemical examination. He also visited the Sahanikera School and received an extract of the Admission Register which showed the age of the victim/deceased to be 15 years old on the date of the incident.

8. On completion of investigation, a charge sheet was laid against the Appellant to which he pleaded not guilty and claimed trial. As many as ten witnesses were examined on behalf of prosecution and for the defence; Dr. Badri Narayan Mishra (DW-1), who was on duty as Medical Officer in the OPD/Casualty of DHH, Puri was examined.

9. On an analysis of the evidence, the trial Court came to the conclusion that the prosecution had proved the charges against the Appellant on both counts of offences i.e., under Sections 302 and 376 of IPC, beyond all reasonable doubt and proceeded to convict and sentence him as noted hereinbefore.

10. The findings of the trial Court were as under:

(i) The evidence of PWs 5 and 6 proved that the Appellant was last seen with the deceased; while he was running away from the spot, he gave a push to PW-5;

(ii) From the version of PWs 2, 5 and 6, it was plain that the Appellant and the deceased were not the strangers to the mill because they had visited it often in the past;

(iii) PW 2 stated that he had kept the jerrycan of kerosene near the electric motor along with a match box and this was not unknown to the Appellant, since he had visited the mill on many occasions;

(iv) Although PW 7, the nurse on duty was declared hostile, in her examination-in-chief she admitted that on 11th May 2012, the deceased had been admitted in the burns ward and that on that date, PW-8 had recorded her dying declaration at 9 pm. Although she denied her presence at the time of recording it, the fact of recording of the dying declaration by PW-8 was admitted by her;

(v) PW-8 in his cross-examination did admit that the deceased had suffered 95% burns and was in a critical condition but he added that he had recorded the statement of the deceased when she was conscious, although he did not make an endorsement on the body of the dying declaration that she was in a fit state of mind. Further, it was also not recorded in the question-answer form. The mother of the victim, i.e., PW-1, who was present throughout, was not made a witness to the dying declaration. Since the victim survived for more than 48 hours thereafter, it could be presumed safely that she was in a fit state of mind at the time of making the dying declaration;

(vi) The evidence of Dr. Badri Narayan Mishra (DW-1) did not weaken the case of the prosecution. He admitted the fact that he had not mentioned in the bed head ticket about the state of consciousness of the deceased and he also maintained studied silence with regard to the nature of the burn injuries;

(vii) The mere failure while PW-1 to disclose at the time of admission of the deceased about her being raped and burnt would not throw doubts of the truth of her version "as such she might have thought it prudent being scared and scarred not to disclose the same before the doctor in the earliest opportunity";

(viii) The vaginal swab was sent nearly four days after the occurrence, when the entire body of the victim was completely burnt and, therefore, the pathological report with regard to the presence of spermatozoa in the vaginal swab "cannot be safely accepted";

(ix) PW-9, the doctor who conducted the post-mortem, admitted that he had not reflected in his report that there was a smell of kerosene in the body but, the fact that the deceased was burnt alive by the Appellant was evident from the statement of PW-1;

(x) Although PWs-1 to 6 were related witnesses, it was unnatural to expect in an offence of this nature, witnesses other than close family members to be available to narrate what happened. Their evidence was fully corroborated by the medical evidence;

11. This Court has heard the submissions of Mr. Bikram Chandra Ghadei, learned counsel appearing for the Appellant and Ms. Saswata Patnaik, learned Additional Government Advocate (AGA) for the State.

12. Mr. Ghadei submitted that where there was no certification by the doctor on the body of the dying declaration that the victim was conscious and in a fit state of mind to make the declaration, the trial Court ought not to have accepted the dying declaration. Reliance is placed on the decision in ***Surinder Kumar v. State of Haryana 2011 SAR (Criminal) 972***. The mother did not endorse the dying declaration as a witness despite her presence throughout. Further, with the deceased having suffered 95% burns, it was very unlikely that she was in a fit state of mind to make any statement whatsoever. The dying declaration, therefore, ought to be discarded. Reliance is placed on the decision in ***Nallapati Sivaiah v. Sub-Divisional Officer, Guntur A.P. 2007 SAR (Criminal) 941***.

13. Mr. Ghadei submitted that there was no evidence whatsoever of the Appellant having committed rape on the deceased. In Ext-15, it had been stated that there was no sign of any recent physical intercourse or presence of any spermatozoa on the vaginal swab. At the spot of occurrence, there were no burn marks. Mr. Gadhei submitted that from the evidence of DW-1, it appeared that the information given by the attendants of the deceased was that the burn had been caused by self-immolation by pouring kerosene at home. It was submitted that the trial Court ought to have held that

she committed suicide being depressed about the decision held in the meeting in the evening hours that the deceased should not have any further relationship with the Appellant.

14. Mr. Gadhei submitted that since all the PWs were related witnesses and inimical to the Appellant, their testimonies ought not to be accepted. Their evidence was also not fully corroborated by the medical evidence. Therefore, it was unsafe to base the conviction of the Appellant on such evidence. Reliance is placed on the decisions in ***State of Rajasthan v. Yusuf 2009 SAR (Criminal) 677, Arun Bhanudas Pawar v. State of Maharashtra (2010) 45 OCR (SC)-494, Waikhom Yaima Singh v. State of Manipur (2011) 49 OCR (SC)-609, Gopal Singh v. State of M.P. (2010) 46 OCR (SC)-739*** and ***State of Orissa v. Tulu Dalabehera (2009) 44 OCR-800***.

15. Mrs. Saswata Patnaik, learned Additional Government Advocate appearing for the State on the other hand, submitted that the dying declaration was correctly recorded by PW-8, who being a government servant was the attending doctor at the DHH, Puri. There was no need for PW-8 to fabricate any evidence as he was nowhere concerned with either the deceased or the Appellant. Reference was made to the Constitution Bench decision of the Supreme Court in ***Laxman v. State of Maharashtra (2002) 6 SCC 710***, which clarified that even in the absence of certification by the doctor as to the mental status of the deceased, the dying declaration could be relied upon. It was submitted that the other decisions cited by learned counsel for the Appellant were

distinguishable on facts. In the present case, not only is the last seen evidence fully proved by PWs-5 and 6 but, PW-8 has proved the dying declaration of the deceased and has also withstood the cross-examination of the defence in that regard. The medical evidence also has corroborated the dying declaration.

16. The above submissions have been considered. The crucial piece of evidence in the present case is the dying declaration, made by the deceased, naming the Appellant as the person who raped her and then set her on fire when she insisted that he should marry her. The legal position in regard to the dying declaration has been explained in ***Sham Shankar Kankaria v. State of Maharashtra (2006) 13 SCC 165*** as under:

> "10. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.
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> 11. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross- examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the

deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. *It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in Paniben v. State of Gujarat (1992) 2 SCC 474 (SCC pp.480-8 1, para 18).* (Emphasis supplied)

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (*See Munnu Raja v. State of M.P*., (1976) 3 SCC 104)

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See *State of U. P. v. Ram Sagar Yadav* (1985) 1 SCC 552 and *Ramawati Devi v. State of Bihar* (1983) 1 SCC 211).

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See *K. Ramachandra Reddy v. Public Prosecutor* (1976) 3 SCC 618).

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See *Rasheed Beg v. State of M.P.* (1974) 4 SCC 264).

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See *Kake Singh v. State of M.P.* 1981 Supp. SCC 25).

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See *Ram Manorath v. State of U.P.* (1981) 2 SCC 654).

(vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. (See *State of Maharashtra v. Krishnamurti Laxmipati Naidu*, 1980 Supp SCC 455).

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See *Surajdeo Ojha v. State of Bihar* 1980 Supp SCC 769).

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See *Nanhau Ram v. State of M.P.*, 1988 Supp SCC 152).

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See *State of U.P. v. Madan Mohan*, (1989) 3 SCC 390).

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See *Mohanlal Gangaram Gehani v.State of Maharashtra*, (1982) 1 SCC 700)"

17. The above legal position was reiterated in ***Puran Chand v. State of Haryana (2010) 6 SCC 566*** and ***Panneerselvam v. State of Tamil Nadu (2008) 17 SCC 190***.

18. In the present case, the dying declaration unequivocally and unambiguously points to the guilt of the Appellant on both counts i.e., for the offence under Section 376 of IPC and of murder under Section 302 of IPC. This is not a case where inconsistent dying declarations have been made by the deceased. The fact remains that although she was burnt alive at around 2 am on 10th May, 2012, she remained alive till the noon of 13th May, 2012, i.e., for well over three days. Further, she remained alive for almost 48 hours after the making of the dying declaration at 9 pm on 11th May, 2012. Her state of mind to make the dying declaration has to be assessed in the above background notwithstanding that she suffered 95% burns.

19. PW-8 is obviously an experienced doctor and was fully aware of the gravity of the situation as far as the making of the dying declaration was concerned. He clearly mentions "at the time of recording the statement, though she was able to talk but was suffering from severe pain". In his cross-examination, he mentioned *inter alia* as under:

> "4.....when I visited the patient at about 12.05 P.M. she was in critical condition having 95% burn injuries and was beyond my control. As such she was referred to Cuttack medical. Throughout the treatment the mother of the patient was present by her side and expressed her inability to shift the patient to Cuttack hospital and preferred to treat her at the Headquarters hospital, Puri. There was 3 degrees of consciousness namely, conscious, subconscious and non-conscious and usually unconscious and sub-conscious state it can be safely presumed that a person cannot speak rationally. However, in a conscious state though a person is capable of revealing her mind rationally in the event of any serious injury, but it cannot be discarded in some cases

> even in conscious state of mind also in extreme case of injury, one can speak in-coherently in state of delirium.xxx"

20. The above statement in cross-examination indicates that PW-8 was aware of what he was doing. There was no need for him to write up a dying declaration which was never made. Merely because he did not endorse on the bed head ticket that the victim was in a conscious state would not mean that no such statement was ever made by her. The same also holds good for the criticism that the declaration was not in a question-answer form. These are not inviolable mandatory requirements for the acceptance of a dying declaration. On the other hand, a Constitution Bench of the Supreme Court in ***Laxman v. State of Maharashtra*** (*supra*) explained as under:

> "3…The court, however has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary

> nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

21. The Court is not persuaded that in the present case the dying declaration was not voluntarily made by the deceased or not in a conscious state of mind and that it should be discarded. In ***Surinder Kumar v. State of Haryana*** (*supra*) at the relevant time not only was the deceased brought to the hospital with 100% burns, but at the time when the Magistrate recorded her statement, the treating doctor was not present. In the present case, the doctor was very much present when the statement was made and in fact it is the doctor who recorded it. Each case, therefore, turns on its own facts and it cannot be laid down as inviolable general rule that without certification of the state of consciousness of the deceased, a dying declaration recorded without such endorsement should be rejected.

22. Again in ***Nallapati Sivaiah v. Sub-Divisional Officer, Guntur A.P.*** (*supra*) there was no evidence of the details of any treatment administered to the victim. The doctor, who was said to have been present at the time of recoding of the dying declaration, was not examined. Moreover, there were two dying declarations which were inconsistent. In the present case, however, there is only one dying declaration and it is not shown to be suffering from any internal inconsistency. The second factor here is that the dying declaration is consistent with what was spoken by the deceased first, soon after the incident, in front of the family members which in turn has been consistently spoken to by PWs 1, 5 and 6. Therefore, the decision in ***Nallapati Sivaiah v. Sub-Divisional Officer, Guntur A.P.*** (*supra*), is also of no assistance to the Appellant in the present case.

23. Turning now to the decision in ***State of Rajasthan v. Yusuf*** (*supra*), it is found that there was an inherent attempt to falsely implicate a large number of family members of the accused. That was what perhaps persuaded the Court to discard the dying declaration. However, in the present case, there is no attempt to implicate anyone other than the Appellant himself. The dying declaration made in the present case lends assurance to its truth and credibility. The other decisions, cited by learned counsel for the Appellant also appeared to have turned on its own facts and do not persuade the Court to discard the dying declaration made by the deceased.

24. As regards as the presence of the accused at the scene of crime, both PWs 5 and 6 have consistently spoken about the Appellant running away from the spot when they reached there. PW 5 stated that the accused gave him a 'push blow'. This was corroborated by PW 6. Therefore there could be no mistake as regards his identity. Both PWs 5 and 6 were subject to detailed cross-examination, which they withstood. Further, when the IO (PW 10) conducted a raid at the house of the accused the next morning, he was absconding. He could be traced only on 15th May 2012. Consequently, the presence of the accused at the scene of crime soon after its commission by him, stands conclusively proved by the prosecution. The alternative plea that the victim immolated herself stands belied by the fact that the accused ran away from the spot and made no attempt to save her.

25. The medical evidence does show that the death was due to ante-mortem burns which were extensive. The forensic evidence has also supported the case of the prosecution regarding the deceased being killed by burning.

26. The dying declaration implicates the accused of both offences viz., of rape and murder. Although the vaginal swab did not indicate the presence of spermatozoa, it has to be recalled that the swab was itself taken three days after the deceased was admitted to the hospital and in a condition of 95% burns. Therefore, the mere absence of forensic corroboration of the dying declaration on this aspect will not falsify the dying declaration, which has otherwise been held to be voluntary and truthful. Consequently,

this Court concurs with the trial Court as far finding the Appellant guilty of the offence under Section 376 IPC is concerned.

27. The net result is that there is no merit in this appeal and it is dismissed as such.

(S. Muralidhar)
Chief Justice

(Chittaranjan Dash)
Judge

S. Behera/ Jr. Steno.